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IN THE

# Supreme Court of the United States

**October Term, 1972**

No. 72-109

LUIS GOMEZ ORTEGA,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February, 1973.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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**October Term, 1972**

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**No.** .....

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LUIS GOMEZ ORTEGA,

*Petitioner,*

VS.

THE UNITED STATES OF AMERICA.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Luis Gomez Ortega prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 11, 1972.

### Opinions Below

The opinion of the Court of Appeals dated December 11, 1972 is not yet reported. It is reprinted in the Appendix at page A-1, *infra*. The District Court of the Southern District of New York did not write an opinion.

## Jurisdiction

Following a jury trial, the petitioner was found guilty of conspiracy to import, distribute and possess heroin and the substantive offense of possessing with intent to distribute a dangerous drug in violation of §§ 812, 841, 952, 957, and 960 of Title 21 of the United States Code.

On April 14, 1972 the petitioner Ortega was sentenced to ten years and fined $10,000 on count one, and to fifteen years and $25,000 on count two, the prison terms to run consecutively.

On December 11, 1972 the United State Court of Appeals for the Second Circuit affirmed the petitioner's judgment of conviction. This petition for writ of certiorari is filed in a timely fashion, an extension of time having been granted by Mr. Justice Marshall by an order dated December 29, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

1. Whether the government in a drug case can refuse to disclose the name of an informant who actually participated in the offense to the extent that he acquired, transported and actually delivered the narcotics to other defendants.

2. Whether the seizure of the drugs in the automobile without a search warrant, three days after its entry into the United States while the car was under constant surveillance, violated the petitioner's rights under the Fourth Amendment.

3. Whether the search of the apartment in New Jersey violated the petitioner's Fourth Amendment rights because no facts were set forth in the supporting affidavit connecting those premises with the sale of narcotics.

## Constitutional Provisions

### AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Statement of Facts

This case is the latest fallout to reach this Court from the government's continued misuse of secret informers. The facts relevant to the informer issue can be introduced to the Court in a summary fashion.

Sometime before August of 1971 a government informer, code named "Festus", purchased a Jaguar car in France and, with the knowledge of the FBI, loaded it with 93 kilograms of heroin which he concealed within the car's bodywork (S-34, 164, 511, 927).[1] On August 3, 1971 the car was registered in the informer's name and on September 10 it was shipped to New York City under the name of the informer, accompanied by him and FBI agents (274-276, 339, 927).

On September 16, 1971 the car was subjected to two searches upon its arrival at Pier 92 in New York City. One was conducted in the hold of the ship and the other while the car was on the pier (S-117). One package of heroin was seized while the car was at the pier, but the rest of the drugs were allowed to remain in the automobile (S-79, 270).

The informer then drove the car to the Playboy Club in Manhattan and left it downstairs in the General Motors Building (332, 333). While the automobile was in the basement parking area of the General Motors Building, the FBI dismantled it and removed 178 bags of heroin, but left one bag, half of a kilogram, in the car.[2] The confiscated bags were replaced with replica bags containing milk sugar and quinine (S-73, 164, 333, 375, 376, 496, 504, 934). That same day the informer took the Jaguar to the Madison Square Garden Garage twice and then to the Hotel Pierre.

The next day he drove the car to a garage across the street from Madison Square Garden and left it there (335).

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[1] Numbers in parentheses refer to the pages of the original trial transcript and, where preceded by "S", to the suppression hearing.

[2] The informer executed a written consent authorizing the search and was never tried.

He then went into Madison Square Garden and, by prearrangement, met Etienne Gunther, to whom he delivered the parking ticket for the car (85).

On September 18 Gunther met Jean Orsini at the Abbey-Victoria Hotel and passed the parking ticket on to him (95-97). Orsini said that he could not have the money until Monday or Tuesday (99). Gunther never had any contact with Ortega or Perez.[3] That evening, George Warren Perez was seen driving the petitioner Ortega and Jean Orsini away from the Alrae Hotel in Manhattan in a Ford stationwagon which was located three days later at 608 82nd Street in North Bergen, New Jersey (559-560).

In the early morning hours of September 19, Luis Ortega gave the parking ticket for the Jaguar to Winston Dyer, who was employed as an attendant by the New Garden Garage in Manhattan. Another attendant went to get the car but returned, stating the car would not start (61, 614). The attendant and petitioner Ortega went upstairs and coasted the car down the ramp to the main floor (614). Eventually the car was started and Ortega drove it down West 31st Street, while Perez and Orsini followed in a Chevrolet. When it reached 8th Avenue it stalled (763).

Thirty FBI agents were swarming all over the area, keeping the car under surveillance, and Agent Devine asked if he could assist the petitioner Ortega in starting the car (S-197, 763). Devine was unable to start the car (763).

Fifteen to twenty minutes after the car's breakdown, the petitioner Orsini and Perez were arrested and the narcotics were seized from the car without a search warrant (328).

[3] On December 14, 1971 Gunther, defecting to the government, plead guilty and testified at the petitioner's trial. His wife Raymonde, who was originally charged with narcotics violations, received amnesty of the Jaguar (Gov't Ex. 4).

Federal agents, armed with search warrants, then searched Room 6-J in the Alrae Hotel, and the premises known as 608 82nd Street, North Bergen, New Jersey. In the North Bergen apartment the authorities seized a scale. Petitioner Ortega's address was 597 Riverside Drive (529, 558, 594-595). No incriminating evidence was found on his person or in his home.

No conversations were ever overheard among Ortega, Orsini or Perez (S-40). Nothing was ever exchanged among any of these defendants (S-40). The only contact among Luis Ortega, George Warren Perez and Jean Orsini was when they were in each other's company outside the Alrae Hotel on the 19th of September (404).

Appellant Orsini stated in an affidavit filed with the trial court that he entered this country for the purpose of picking up a 1971 Jaguar sedan but that he did not have a driver's license permitting him to operate the vehicle in this country.[4] Orsini swore that he contacted appellant Ortega for social purposes and, since he could not operate the car, he asked him to assist in driving the vehicle from the New Madison Square Garden Garage.

Orsini forthrightly stated that petitioner Ortega had absolutely no knowledge that the Jaguar contained heroin concealed in its bodywork. The only reason Ortega was with Jean Orsini on the night of September 19 was to assist him in driving the car to its ultimate destination.

As previously stated, petitioner Ortega was convicted on March 7 as charged and sentenced on April 14, to 25 years imprisonment. The judgment of conviction was affirmed December 11, 1972 by the United States Court of Appeals for the Second Circuit.

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[4] These facts, and those that follow, are found in the supporting affidavits for Ortega's motion requesting a severance.

## REASONS FOR GRANTING THE WRIT

### I.

**The petitioner's Constitutional right of Confrontation was violated by the government's refusal to disclose the identity of an informer who participated in the event to the extent that he acquired, transported and actually delivered the narcotics to other defendants.**

The judgment below, denying to the defense disclosure of the government informer's identity, raises the gravest constitutional doubts. The awful spectre of the misuse of secret informers has stalked across the pages of this Court's decisions for more than a decade.[5] The melancholy forecast in the comments of members of this Court, noted below, has all too soon been fulfilled. This case, more than any other confirms the Court's worst suspicions of how the use of informers can be treacherously abused.

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[5] A few illustrative instances where members of this Court have revealed their misgivings about the use of secret informers are:

"It is not unknown for the arresting officer to misrepresent his connection with the informant, his knowledge of the informer's reliability, or the information allegedly obtained from the informant." Mr. Justice Douglas' dissent in *McCray* v. *Illinois*, 386 U.S. 300, 316, n. 2 (1967).

"The plea that evidence of guilt must be secret is abhorrent to free men because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informant undetected and uncorrected." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 551 (1950).

"When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those we despise." *Peters* v. *Hobby*, 349 U.S. 331, 352 (1955).

"The prejudicies, the credibility, the passions, the perjury of the informer are never known. If they were exposed, the whole charge might wither under the cross-examination." *United States* v. *Nugent*, 346 U.S. 1, 14 (1953).

"This is an age where faceless informers have been introduced into our society in alarming ways." *Jones* v. *United States*, 362 U.S. 257, 272 (1960).

The mishandling of secret informers in law enforcement today is reaching epidemic proportions. Consequently, no case deserves review by this Court more than the one at bar.

The informant's involvement in this prosecution is staggering and goes far beyond any other previously reviewed by this Court.[6] Here the informer purchased the Jaguar in his own name, loaded it with heroin, and shipped it under his name to the United States (34, 164, 339, 927). He brought the drugs through customs and drove the car around New York for three days (30, 79, 270). A consent form for the search of the car was executed by him, which the government claimed authorized the dismantling of the automobile at the General Motors garage, where 178 bags of heroin were seized (73, 174, 333, 339). He then delivered the car with one bag of heroin still concealed in it to the defendant Gunther (85). In the application for the search warrant this informant was referred to as a co-defendant (488). The informer was also named as one of the co-defendants in the original complaint filed before the United States Commissioner (486-487).

When the trial and circuit courts stood by the government's refusal to divulge the informer, this case was immediately destined to reach this Court.

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[6] Stunned by the magnitude of the informant's participation in this offense, Judge Pierce invited the government to reveal the informer's name by declaring: "On the question of the disclosure of the informant's name, doesn't it appear to you, Mr. Walker, that the involvement of the informer in this case at various important stages is so significant as to require disclosure of that name in order to insure or assure the defendants a fair trial?" (306) However, the government made a drastic choice when it declined the court's invitation and refused disclosure (415). This unfortunate decision turned out to be the government's worst miscalculation during the course of the trial.

In 1957, this Court concluded in *Roviaro* v. *United States*, 353 U. S. 53 (1957), that due process required the government to disclose an informant's identity who had played a part in bringing about the possession of certain drugs by the accused and may have been a material witness on the issue of the defendant's knowledge.[7]

Here defense counsel could easily have developed significant facts relating to the defense of entrapment, perhaps could have shown that both Ortega and Perez had absolutely no knowledge of the narcotics concealed in the car and, more importantly, were unknown to the importer-informant.

The informer undoubtedly would have testified about the very minor role played by Ortega as a delivery man. In any event, defense counsel certainly was entitled to examine the informant to determine for themselves what helpful testimony he could have supplied in their defense.

Regrettably, circuit courts, by denying disclosure, are beginning to drift away from the original moorings fixed by this Court in *Roviaro*.[8] This case, better than any other,

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[7] More particularly, the Court pointed out in language directly applicable to this case:

> "Doe had helped to set up the criminal occurrence and had played a prominent part in it. *His testimony might have disclosed an entrapment.* He might have thrown doubt upon petitioner's identity or on the identity of the package. He was the only witness who might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' from the tree to John Doe's car. The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, *was a matter for the accused rather than the Government to decide.*" (353 U.S. at 64; emphasis added.)

[8] *United States* v. *Kelly*, 449 F.2d 329 (9th Cir. 1971); *United States* v. *Anthony*, 444 F.2d 484 (9th Cir. 1971); *United States* v. *Russ*, 362 F.2d 843 (2d Cir. 1966); *United States* v. *Coke*, 339 F.2d 183 (2d Cir. 1964); *United States* v. *Li Fat Tong*, 152 F.2d 650 (2d Cir. 1945).

marks the extent of that drift. On the other hand, other circuit courts, obeying *Roviaro's* mandate, have required disclosure where the informant was an active participant in the offense or was present at the scene of the crime.[9]

Clearly the circuit courts of this nation are dramatically divided over this critical issue. Consequently, a restatement of the informer disclosure rule is desperately needed to bring order to this area of the law. The despair and disorder of these decisions has reached an intolerable state.[10]

It bears repeating that here the informant launched the whole importation scheme and delivered the narcotics to

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[9] *United States* v. *Barnett*, 418 F.2d 309 (6th Cir. 1969); *Clingan* v. *United States*, 400 F.2d 849 (5th Cir. 1968); *Lopez-Hernandez* v. *United States*, 394 F.2d at 820 (9th Cir. 1968); *United States* v. *Roberts*, 388 F.2d 646 (2d Cir. 1968); *Velarde-Villarreal* v. *United States*, 354 F.2d 9 (9th Cir. 1965); *United States* v. *D'Angiolillo*, 340 F.2d 453 (2d Cir. 1965); *Gilmore* v. *United States*, 256 F.2d 565 (5th Cir. 1958); *Portomene* v. *United States*, 221 F.2d 582 (5th Cir. 1955); *United States* v. *Conforti*, 200 F.2d 365 (7th Cir. 1952); *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950); *Sorrentino* v. *United States*, 163 F.2d 627 (9th Cir. 1947); *United States* v. *Andolschek*, 142 F.2d 503 (2d Cir. 1944).

[10] The rule of informer disclosure has fared no better in the States, for there the law is in an equally confused state. The following courts have required disclosure:

*State* v. *Godwin*, 106 Ariz. 252, 475 P.2d 236 (1970); *State* v. *Martinez*, 15 Ariz. App. 430, 489 P.2d 277 (1971); *Rivera* v. *Superior Court*, 6 Ariz. App. 117, 430 P.2d 696 (1967); *People* v. *Hunt*, 4 Cal.3d 231, 93 Cal. Rptr. 197, 481 P.2d 205 (1971); *People* v. *Garcia*, 67 Cal.2d 830, 64 Cal. Rptr. 110, 434 P.2d 366 (1967); *Price* v. *Superior Court*, 83 Cal. Rptr. 369, 463 P.2d 721 (1970); *People* v. *Clifton*, 42 Ill.2d 526, 250 N.E.2d 649 (1969).

Whereas these courts have denied informer disclosure:

*People* v. *McShann*, 50 Cal.2d 802, 330 P.2d 33 (1958); *Ferraro* v. *State of Florida*, 101 So.2d 797 (1958); *People* v. *Mack*, 12 Ill.2d 151, 145 N.E.2d 609 (1957); *Morss* v. *Forbes*, 24 N.J. 341, 132 A.2d 1 (1957). See Anno. 76 A.L.R.2d 262 (1961); *People* v. *Castro*, 29 N.Y.2d 324, 277 N.E.2d 654 (1971); *People* v. *Cerrato*, 24 N.Y.2d 1, 246 N.E.2d 501 (1961); *People* v. *Pena*, 18 N.Y.2d 837, 222 N.E.2d 604 (1966).

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the defendants by leaving the car in the New Garden garage. Although the informant had no direct contact with the petitioner, that makes no difference. What is important is the fact that the informant's activities here were revealed to the jury, as a participant in the offense. Consequently, it should have been left to defense counsel, as advocates, what use may have been made of the informant's testimony. Surely it was highly improper for the Second Circuit to preempt that function and to decide that disclosure would not have been advantageous.[11] For, as in the Jencks Act cases, what use may be made of this form of evidence must, of constitutional necessity, be left to the single-mindedness of defense counsel.[12]

Certainly no one could successfully argue to this Court that there was not a reasonable probability that the informer here could have given testimony in some way helpful

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[11] The Second Circuit attempted to shore up the validity of its decision by suggesting that disclosure of the informant would not have been helpful to the defense. Appellate Judges should resist the temptation of becoming trial strategists, a role for which they are ill-suited. These judgments should be left to defense counsel who are better equipped to act as advocates.

[12] In discussing this very issue, the Supreme Court of California, a court of great vision, in *Price* v. *Superior Court*, 83 Cal. Rptr. 369, 463 P. 2d 721 (1970), held that the defendant need not prove that the informer would give testimony favorable to the defense in order to compel disclosure, nor need he prove that the informer was a participant in the offense. The court there determined that the defendant need only show that the informer would be a material witness on the issue of guilt and that nondisclosure would deprive him of a fair trial. Certainly that has been amply demonstrated here.

Rule 19(c)(2) of the Rules of Practice and Procedure of the Judicial Conference has some bearing on this issue, for it provides:

> "If an election is made not to disclose the identity of an informer and the circumstances indicate a *reasonable probability* that the informer can give testimony . . . necessary to a fair determination of a material issue in the case, the judge shall . . . dismiss the proceedings." (51 F.R.D. 378)

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to the defense, either on the critical entrapment issue or on the petitioner's lack of knowledge of the narcotics in the car.

The use of the informant in confirming the defense of entrapment was of critical importance, for the magnitude of that defense cannot be underestimated. A vigorous examination of the informant would have most likely developed facts showing the government's participation in the drug smuggling scheme beyond what they would like us to believe. These facts would have borne critically on the defense of entrapment.[13]

Entrapment occurs when the criminal conduct is "the product of the creative activity" of law enforcement officials. *Sherman* v. *United States*, 356 U.S. 369 (1958). Clearly the creative activity in this case was the government's virtually underwriting of the importation of these narcotics and its insuring their safe passage through customs to their ultimate destination. Their feeble efforts to

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[13] The past few years have seen a considerable change in the posture of legal institutions toward the defense of entrapment. Enlightened courts are beginning to reject prosecutors' invitations to become accomplices in their distasteful criminal conduct designed to catch offenders. *United States* v. *Russell*, 459 F.2d 671, (9th Cir. 1972); *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); *People* v. *Strong*, 21 Ill.2d 320, 172 N.E.2d 765 (1961).

Even Judge Pierce was astonished by the government's participation in this drug offense. He voiced his distress by stating: "This may be the key point in this matter, to take up the question of the heavy involvement of the informant. There is a question from the record so far that he is heavily involved, and I need not tell you that this involvement is so great, in fact, as to seriously raise questions as to whether or not, but for the participation and cooperation of the govenment agents and the informant, the crime might never have occurred" (291-292).

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disclaim this responsibility could easily have been repudiated by the informer had he been called to the stand.[14]

On October 16, 1972, this Court granted certiorari in *United States* v. *Russell,* Docket No. 71-1585, opinion below, 459 F.2d 691 (9th Cir. 1972). In *Russell,* the Ninth Circuit held that the defendant could not be convicted for manufacturing and possessing a drug where a necessary ingredient for its manufacture was supplied by an agent of the government. Since the issue in *Russell* is directly related to the one at bar, this Court may wish to consider this case at the same time it judges *Russell.*

No member of this Court can be other than unhappy about the government's participation and overreaching in this serious drug offense. It is frightening that in order to obtain evidence of the distribution of narcotics, our government must actually inspire and participate in the arrangement for the importation of dangerous drugs into this country. The spectacle of federal agents secretly mated with the underworld and using gangsters to gain its ends is indeed unwholesome. Use of these unbecoming tactics should rightly influence this Court's grant of this petition. For if the Court ever gives in to the government here, there will be no end to the misuse of informers, who actually participate in the crime, but whose identity is concealed, thus, depriving the defense of information critical to their cause.

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[14] The American Law Institute Model Penal Code provides that entrapment may be established if it can be shown that a police officer encouraged another person to engage in the criminal offense by: "Employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." (Model Penal Code, § 2.13[1][6]; Proposed Official Draft, 1962) Here the importation of narcotics into this country by the government surely created a risk that others might become involved in its delivery who were not originally contemplated in the plan's implementation.

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The Second Circuit's decision is in direct defiance of this Court's mandate in *Roviaro*. In fact, the rule of informer disclosure is being driven out of existence by such decisions and if this trend is not halted, *Roviaro* risks bankruptcy. This Court simply cannot afford to abandon a position it has maintained for over a decade.

And finally it must be said that because of the horror surrounding heroin prosecutions courts are often tempted to relax constitutional standards and let the prosecution take shortcuts not ordinarily sanctioned by law. Such practices tend to lower the standards of criminal justice. If only the fate of drug pushers were involved in cases such as this, one might be indifferent to the way in which their convictions are obtained. But it is precisely because the appeal to the Fourth and Sixth Amendments is so often made by persons who are claimed to be unworthy that its infringements call for strenuous resistance. No court can give legal sanction to what was done in this case without accepting the full responsibility for the far-reaching consequences of such a precedent.

For all these reasons, the petition for certiorari should be granted.

## II.

**Where the police for three days had known of the narcotics in the car and had ample time to secure a search warrant, there were no exigent circumstances justifying the warrantless search of the car.**

**The search of the apartment in New Jersey was unlawful because no facts were set forth in the supporting affidavit connecting those premises with narcotics.**

The elusive search and seizure question presented here, involving the appropriation of the narcotics concealed in the Jaguar car, deserves this Court's most careful attention. For the narcotics seized while the car was in the possession of the defendants were introduced against the defendants over their objection that it had been unconstitutionally acquired.

The searches of the car at the port of entry and in the General Motors Building were presumably authorized under appropriate customs regulations governing border searches. In any event, during those times the Jaguar car was in the possession of the informant and he apparently consented to its search. However, when the car was ultimately transferred to Orsini by the delivery of the parking ticket, the authority to further search it under the customs law expired.

It bears repeating that the government knew of the concealment of the narcotics in the Jaguar car from the time the car left France until its ultimate seizure on September 19. They could have easily obtained a search warrant for the automobile on the 16th, 17th or 18th of September. Consequently the last search was unconstitutional because it was without a warrant; it was not incident to an arrest; it was without consent; there was no emergency; and the

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contraband was not in immediate danger of destruction. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Chimel* v. *California*, 395 U.S. 752 (1969); *Preston* v. *United States*, 376 U.S. 364 (1964); and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950). Accordingly, there was no good reason why the police should not have secured a warrant for the search of the car.

The decisions governing car searches are in a terrible state of turmoil. In sailing across this ocean of the law, the lawyer often finds himself steered by stars that are disturbingly in motion. Consequently, the colonization of the cases located in this legal environment is badly needed, warranting a review in this case.

In *Coolidge* this Court, using passages of harsh strength, was careful to remind prosecutors and Circuit Judges that:

> "The Warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over the country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action, rather than just a pious phrase, then '[t]he exceptions cannot be enthroned into the rule.'" (403 U.S. at 481)[15]

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[15] In keeping with the Supreme Court's admonitions in *Coolidge*, circuit courts have insisted that warrant procedures be followed in cases less severe than our own. *United States* v. *Collins*, 439 F.2d 610 (D. C. Cir. 1971); *United States* v. *Payne*, 429 F.2d 169 (9th Cir. 1970).

*United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), deserves discussion because it has some bearing on the issues presented here. There a package sent through the mail, which was suspected of con-

(Footnote continued on following page)

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We repeat that the FBI had known about the role of the Jaguar in this importation scheme since its very inception. The car had been kept under surveillance and was always subject to immediate capture. There was no opportunity for the defendants to destroy the evidence concealed in the car's body, nor was there time to do so. However, there was ample time for the FBI to secure a warrant authorizing the search and seizure of the automobile. There was no real danger of the automobile being removed from the jurisdiction, for on the night of the petitioner's arrest, there was an army of over 30 FBI agents in the immediate vicinity of the automobile who ultimately stormed the car. Thus, there was not the slightest excuse for what occurred in the zeal of the chase here. This police action represents a clear and untenable abuse of the limited authority conferred upon them by law. A search warrant could have been secured which, as pointed out by Judge Pierce, may have constitutionalized the search.

It was unforgivable for the police not to obtain a warrant. These arrangements could have been made when the automobile entered the United States. The unfounded fear that the automobile might be removed from the jurisdiction could have been easily accommodated.[16]

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(Footnote continued from preceding page)
taining stolen coins, was detained for 29 hours so that a search warrant was obtained. The case is analogous in that the government's control of the car here probably was constitutionally permissible for a limited period of time, but clearly under *Van Leeuwen* a search warrant was ultimately required to breach the privacy of the automobile.

[16] Rule 41 merely limits the *issuance of a warrant* to the district in which the property sought to be searched is located. Surely, once execution of the process is started in the district of issuance, its completion, in hot pursuit of the vehicle, could occur outside the district. We can find no authority to the contrary and we are unable to imagine any court holding otherwise.

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Our situation is analogous to one where an informer may have concealed narcotics in a hotel room leased in his name. If thereafter the room were rented by another person, by prearrangement, no one would argue for a moment that the narcotics could be seized without a search warrant, even though the suspect was arrested in the hotel room. *Johnson* v. *United States,* 333 U.S. 10 (1948); *Chimel* v. *California, supra.* Although the knowledge of the narcotics in the hotel room, acquired over three days, would undoubtedly supply ample probable cause, that feature could not be used to avoid traditional warrant procedures. The search of this Jaguar reeks of all the evils which would surface in the warrantless search of the hotel room.

It is true that an immediate search of an automobile may be made without a warrant under emergency circumstances "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Chimel* v. *California,* 395 U.S. 752 (1969); *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Carroll* v. *United States,* 267 U.S. 132 (1925).

However, the facts in *Chambers* are far different from those here. There the police clearly had no time to get a warrant, and if a search was to be effected, it had to be made immediately. The Court then went on to point out: "Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search." (399 U.S. at 51.) The Court then stressed that only when a car is stopped on the highway and the contents may never be found again if a warrant

must be obtained, that an immediate search is constitutionally permissible.[17]

Here, in contradistinction to *Chambers,* the vehicle was under the constructive control of the federal agents. It was not by any stretch of the imagination being used to flee from a crime, and more importantly, the government knew they were eventually going to search the car and thus cannot be excused from failing to obtain a search warrant.

To extend *Carroll* and *Chambers* to every search for evidence in any automobile, even when the car is under direct surveillance for three days, would dangerously impair the constitutional rule requiring law enforcement officials to obtain a detached and neutral judgment on the question of probable cause unless they can demonstrate special need for the exemption. *Chimel* v. *California, supra; Katz* v. *United States,* 389 U.S. 347 (1967); *Warden* v. *Hayden,* 387 U.S. 294, 299 (1967).

Clearly, the extraordinary circumstances of this case place the petitioner on the warrant side of the great divide between *Coolidge* and *Chambers.* The longer promises of *Coolidge* extend to this search, whereas the shorter commitments of *Chambers* are completely inapplicable.

The petitioner Ortega also complains of the search of the apartment located at 608 82nd Street, North Bergen, New Jersey, as being constitutionally inadequate.

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[17] However, the Court in *Chambers* was careful to emphasize: "Neither *Carroll, supra,* nor other cases in this court require or suggest that in every conceivable circumstance a search of an auto, even with probable cause, may be made without the extra protection for privacy which a warrant affords." (399 U.S. at 50)

On September 19, 1971 a search warrant was issued by United States Magistrate Jerome Schweitzer for a search of those premises. The execution of that warrant on the same day produced a Hanson scale, which was received in evidence against all the defendants. It was argued that this scale was a device usable for weighing and packaging narcotics.

Counsel effectively complained about this search, urging that there were absolutely no facts of probable cause supplied to the magistrate in support of this warrant (401). Nevertheless, despite counsel's protestations, the court sustained the warrant (454).

The affidavit in support of the search warrant merely traced the history of the importation into the United States of the drug-laden Jaguar and its ultimate delivery to the defendants. However, these facts involving merely Ortega's driving the car out of the New Garden Garage in no way inspired any probable cause for the search of an apartment in New Jersey. The conclusory statements that Ortega "is a major trafficker in narcotics" and that he is the person believed to be making the downpayment provided no basis for the search of the premises in New Jersey. For that matter, the government knew that all the drugs imported, with the exception of one bag, had been confiscated. Consequently, no drugs connected with this importation scheme could possibly have been found in the apartment in New Jersey allegedly rented by Ortega.

*Aguilar* v. *Texas*, 378 U.S. 108 (1964), is dispositive of this issue and should compel the Court to suppress the evidence. For there, no more was supplied to the magistrate than was furnished here, and the Court had no difficulty invalidating the warrant.

In a case almost identical to ours, the Ninth Circuit in *United States* v. *Bailey*, 458 F.2d 408 (9th Cir. 1972) condemned a warrant for the search of a home despite ample probable cause to arrest the occupants on the ground that there was no reason to believe that evidence of crime would be found in the home. The *Bailey* case and the one at bar present a clear conflict in the circuits and should compel a grant of certiorari.

It only remains to be said that this Court must reject the government's invitation to become their handmaiden in lawlessness. Here the government plunged into these protected precincts without regard for the consequences. By taking proper precautions, they could possibly have saved this search. Failing to do so, they must now bear the responsibility for that misadventure. For if these gross violations are ignored, the deterrent effect of our constitutional rules governing precipitous searches by both police and prosecutors will be significantly undermined.

This Court simply cannot disregard the approach taken in *Preston* and *Coolidge*, and create a special rule for automobile searches which, under these circumstances, does not comport with generally applied Fourth Amendment principles. To allow the judgment below to stand uncorrected will sound a requiem for *Preston* and *Coolidge*.

We are not unmindful that the safety of the community is threatened by the sale and distribution of narcotics. But in a much more vital sense, the safety of society is protected by decisions which serve as a safeguard against the most terrifying symbol of a police state—the arbitrary seizure and arrest of people in the streets and the confiscation of their property by police officers who have become masters rather than servants of the law. When we become indifferent to these constitutional abuses, we are

well on our way to losing these rights. For lurking in the dark shadows of these low-visibility car searches is a threat to every man's security and privacy. Such a case puts our judicial system to its severest test—but that challenge must be met if the privacy of all men is to remain safe.

For all these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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## APPENDIX "A"

### Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Nos. 221, 222—September Term, 1972.

(Argued October 13, 1972 Decided December 11, 1972.)

Docket Nos. 72-1479, 72-1482

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UNITED STATES OF AMERICA,

*Appellee,*

—v—

LUIS GOMEZ ORTEGA, GEORGE WARREN PEREZ and JEAN ORSINI,

*Defendants-Appellants.*

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Before:

FRIENDLY, *Chief Judge,*

MEDINA and ANDERSON, *Circuit Judges.*

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Appeal from judgments of conviction in the United States District Court for the Southern District of New York, Lawrence W. Pierce, *Judge.*

Luis Gomez Ortega, George Warren Perez and Jean Orsini appeal from judgments entered on the verdict of a jury, convicting them of conspiracy to import, distribute

and possess with intent to distribute 93½ kilograms of heroin, in violation of 21 U.S.C., Section 846, and with distribution and possession with intent to distribute of one-half kilogram of heroin, in violation of 21 U.S.C., Section 841(b)(1)(A) and 18 U.S.C., Section 2.

Affirmed.

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ARTHUR J. VIVIANI, Assistant United States Attorney, New York, N.Y., (Kenneth Feinberg, John M. Walker, Jr., John W. Nields, Jr., Assistant United States Attorneys, and Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, New York, N.Y., on the brief), *for Appellee.*

HERALD PRICE FAHRINGER, Buffalo, New York, (Lipsitz, Green, Fahringer, Roll, Schuller and James, Buffalo, New York, on the brief), *for Defendant-Appellant Luis Gomez Ortega.*

NANCY ROSNER, New York, N.Y., (Edmund Allen Rosner and Rosner & Rosner, New York, N.Y., on the brief), *for Defendant-Appellant George Warren Perez.*

IVAN S. FISHER, New York, N.Y., (Albert J. Krieger and Alan Scribner, New York, N.Y., on the brief), *for Defendant-Appellant Jean Orsini.*

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*Opinion of Court of Appeals*

MEDINA, *Circuit Judge:*

This is an appeal from judgments, entered upon the verdict of a jury, after a trial before Judge Pierce, by Ortega, Perez and Orsini, each of whom was found guilty on both counts of an indictment charging them with conspiracy to import, distribute and possess with intent to distribute 93½ kilograms of heroin, in violation of 21 U.S. Code, Section 846, and with distribution and possession with intent to distribute a smaller quantity, about a half kilogram, of heroin, in violation of 21 U.S. Code, Section 841(b)(1)(A), and aiding and abetting, in violation of 18 U.S. Code, Section 2. Ortega and Orsini were each given heavy sentences of 10 and 15 years imprisonment on the two counts, to be served consecutively, and fines of $10,000 and $25,000, or an aggregate of $35,000 were imposed on each. Perez was sentenced to 7 years imprisonment on each count, to be served concurrently, and he was fined a total of $7,000. These three appellants are now serving their sentences.

Each appellant claims that the evidence adduced by the prosecution was far short of what was required to establish the commission of the crimes charged. Each of them also asserts that the judgment of his conviction must be reversed for a variety of other reasons which we can more readily describe after stating in chronological order the facts as the jury may have found them to be.

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*Opinion of Court of Appeals*

*I*

*The Background and the Development of the Conspiracy*

Somewhere in the world there must be persons of enormous wealth and influence who individually or in groups support and manage the gathering of the raw materials, the processing of vast quantities of heroin and the sending of this heroin to the United States. These unknown persons operate in many countries and one of the characteristics of their operations that help these master minds to avoid detection is that their numerous agents often have no acquaintance with one another until they converge and carry out their secret orders with respect to the distribution of a particular shipment and the receipt and return of the money to those who had planned and supervised the venture. This record does not disclose the over-all operations of this international narcotics ring, nor the identity of those who plan its operations. Nor does the indictment contain any such charge. But the record does disclose and the indictment charges these particular appellants with the crimes above stated with reference to a particular shipment of a very large quantity of uncut and practically pure heroin, amounting to 93½ kilograms and of a retail value of $1,000,00, according to the evidence. This heroin was hidden in a variety of open spaces in the construction of the chassis of a tan colored Jaguar Sport Car, and these 180 bags of heroin could have been concealed in this automobile only after it had been dismantled by skilled mechanics and then put together again. Of the individuals who converged and met in New York City to carry out their secret orders and to transport and deliver this heroin and receive the money to be paid by the prospective purchasers,

one was a Corsican who came from Barcelona, Spain, one came from France and two were Cubans at least temporarily living in New York City or the vicinity. French and Spanish interpreters were in attendance throughout the trial. We do not know who supplied this large quantity of heroin or who paid for it or who secreted the bags in the Jaguar. Nor do we need to know. We do know that upon arrival in New York the Jaguar contained the hidden 180 bags of heroin and we do know that each of these appellants played his several role, working with the others and that they were in possession and control of the Jaguar at the time they were all taken into custody. As we shall see, the evidence of the acts of these three conspirators and their knowledge that heroin was concealed in the Jaguar is overwhelming.

We give this brief description of the background because the man who bought the Jaguar in England and who came with it to New York on the Queen Elizabeth II, and the man who turned it over to those who were waiting here to receive it was a government informer. The principal point raised by appellants is that they claim the trial judge should have forced the government not only to identify this informer but to describe his whereabouts and to produce him for the alleged purpose of giving appellants an opportunity to put him on the witness stand and support what appellants choose to call their "defense" of entrapment. It was stipulated that the informer purchased the Jaguar in England in the presence of one of the U. S. Narcotics Agents, that is to say that the agent saw him buy it, and that the government did not furnish any money to buy the Jaguar or give any instructions to the informer to buy it. The informer had no contact whatever with any

of these appellants and the so-called "defense" of entrapment was not supported by any proof whatever, as none of the appellants testified at the trial. Moreover, with such a large shipment and the total absence of any showing that the government paid for any part of the heroin or had anything whatever to do with hiding the 180 bags of heroin in the Jaguar, we think this wholly unsubstantiated "defense" is absurd. We shall return to this subject later.

The events charged in the indictment commence in August of 1971 when a Frenchman named Etienne Gunther, who lived with his wife and young daughter in Paris, went to Niolon, a small village near Marseilles, and spent the weekend at the villa of Etienne Mosca, who had formerly been the husband of Gunther's sister Georgette. Gunther knew that Mosca was a trafficker in heroin and the upshot of the visit was that Gunther agreed on September 7, 1971 to go to the United States and bring back a large quantity of currency which he was to smuggle into France and deliver to Mosca. The arrangements made between Mosca and Gunther, who pleaded guilty to one of the counts of the indictment and later testified for the government at the trial, give a clear blueprint of what was to take place. And the cunning way in which Ortega, Perez and Orsini covered their tracks and resorted to subterfuges, the use of false names and a continual shuttling around to avoid detection, form a web of direct and circumstantial proof from which these appeallants could find no avenue of escape.

The basic plan was simple. One person, who, unknown to the participants in the conspiracy, turned out to be the government informer, was to bring the Jaguar and its hidden 93½ kilograms of heroin from England to the

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United States on the Queen Elizabeth II, leaving Southampton September 10, 1971. The schedule was tight. Gunther and his wife were to arrive by plane in New York on September 14; the Queen Elizabeth II docked in New York on September 15. Although the persons involved in the operation did not previously know one another, clandestine means were planned by which the car and its contents could be delivered to one of the conspirators, and by which the conspirator who thus had control of the Jaguar and its contents could make contact with the others who were to distribute this large quantity of heroin and receive the money to be paid for it. The final stage was to be the return of Gunther to France with the money, not later than Monday, September 20th. The conspirators thought they were operating successfully on schedule until Ortega, Perez and Orsini were arrested in the early morning of Sunday, September 19th, as they were attempting to drive off the Jaguar to make the delivery and receive the money. They had made the necessary contacts with one another, they had provided the place where the heroin was to be weighed, packed and delivered, and Gunther had started to build the false bottoms in the suitcases provided by Mosca to hide the large quantity of currency to be smuggled back into France by Gunther.

We may remark, parenthetically, that a combination of customs agents and agents of the Bureau of Narcotics and Dangerous Drugs made an examination of the Jaguar and its contents in the hold of the Elizabeth II as she came up the harbor, and one of the 180 bags of heroin was removed for testing. Late the next night while the Jaguar was in a garage opposite the Playboy Club, where the informer was disporting himself with a young lady, government

mechanics dismantled the Jaguar, removed 178 bags of the heroin and substituted a similar number of bags containing a harmless loctose, and left hidden in the car bag number 179, with its original contents of pure, uncut heroin. A final search of the Jaguar was made after the arrest and this disclosed bag number 179 and its contents just where the government agents had left it. In the meantime, however, Ortega, Perez and Orsini thought the Jaguar, now in their possession and under their control, contained its original load of 180 bags or 93½ kilograms of heroin. Appellants claim that all these searches, or most of them, were made without warrants and without probable cause in violation of their Fourth Amendment rights. Even the searches made in execution of warrants are attacked as made without probable cause and on the basis of insufficient affidavits.

We shall now trace the covert operations of the conspirators. On Friday, September 17, the Jaguar was parked in the New Madison Square Graden public garage by the man who had brought it from England. Gunther had never seen this man but Mosca had shown Gunther a photograph of him. They were to meet at #8 Bowling Alley in the New Madison Square Garden at 12:00 to 12:30 P.M. or 6:00 to 6:30 P.M. and they were to recognize one another by the identification of a folded newspaper and a pen-shaped key ring that each was to carry. They met at the appointed time and place, recognized one another and the parking ticket was delivered to Gunther. At this point the informer steps out of the picture and he has nothing to do with Gunther's making contact with the second unknown, who turned out to be Orsini, who had arrived by plane from Barcelona, Spain one day behind schedule.

The meeting between Gunther and Orsini takes place. This time the recognition signal is that each is to carry an unfolded newspaper and a flashlight-shaped key ring and Gunther was to use the code name Thomas. The parking ticket for the Jaguar is now turned over to Orsini and elaborate arrangements are made for a later meeting at which Orsini was to hand over the money to Gunther to be taken back to France.

In Orsini's possession at the time he received the parking ticket from Gunther were several documents written in French. These were on Orsini's person at the time Ortega, Perez and Orsini were arrested. One of these documents contains a description of how Orsini is to recognize Gunther and the code name "Thomas," another is a diagram of the Jaguar showing the 10 places where the 180 bags of heroin were concealed and still another document containing instructions how to take the Jaguar apart to get out the herion.

The government agents knew that the Jaguar and its contents had arrived and they had taken the precaution of seizing all but one bag of this very valuable cargo. But they did not know to whom the Jaguar and its supposed contents were to be delivered nor who the other cooperating members of the conspiracy might turn out to be. How these people were located is the story of a very fine piece of detective work. And, as this story unfolds, it becomes clearer at every step that each of these appellants knew they were possessing and distributing an unusually large shipment of herion and that their guilt of the charges contained in the indictment was established.

So, on Saturday, September 18, the agents followed Orsini from the Hotel Abbey Victoria, where he met Gunther, to the Hotel Alrae where Orsini had registered as a guest, using the false name of Jean Pierre Andre Huguen.[1] Now that he had in his pocket the parking ticket and instructions how to dismantle the Jaguar and get out the herion, we might expect him to make a beeline for the people who were to help distribute the heroin and collect the money, and that is precisely what Orsini did, with the usual backing and filling and getting in and out of cabs that indicate an effort to throw any government agents off the scent. So, Orsini started off in a cab and went straight to 587 Riverside Drive, where Ortega was to be found. When a search warrant was executed and the contents of Orsini's room at the Hotel Alrae were seized, there was found a memorandum containing the following:

476 Riverside Drive Apt 1D
New York—N.Y. 10031
1 5 (1)—3738

The 1 in a circle is a code indication that the real Riverside Drive address is to be obtained by adding 1 to each of the numbers in 476. Thus Orsini knew that the man he was looking for was at 587. Certain numbers also appear on this memorandum which is on Hotel Alrae notepaper. The inference, of course, is that Orsini brought with him from Barcelona the papers in French giving him instructions how and where to identify Gunther, describing the hiding places of the 180 bags of herion and how to take the car apart to get them, but the memorandum giving Ortega's address

[1] The prosecution found out through the French police that his real name was Jean Orsini.

in code was made after some telephoning by Orsini in the interval between his arrival at the Alrae after receiving the parking ticket from Gunther and 3 P.M. when he started to go up to 587 Riverside Drive. He stayed there only a few minutes and then went back to the Alrae. There was no time to lose if he was to effect delivery of the heroin and have the money representing the purchase price ready to hand to Gunther on Monday, September 20, at the Sports Bar on 51st Street between 8th and 9th Avenues, as agreed between Gunther and Orsini at the time of delivery of the parking ticket. What Orsini was to hand to Gunther at the Sports Bar was the money.

This was a busy time for the conspirators. They must prepare a place to unload the Jaguar, a place to weigh and repack this huge quantity of heroin and get together the pile of bills that Gunther was to hide in the false bottoms of the suitcase given to him by Mosca. Gunther was busy constructing these false bottoms according to detailed instructions from Mosca, but time ran out and he and these three appellants were arrested when their plans miscarried and the Jaguar broke down just as they were on their way to make delivery of the heroin and get the money ready. More of this later.

Orsini left the Alrae again at 4 P.M. on Saturday, September 18. He handed the cab driver, who happened to be a government agent, a slip of paper on which was written the address 1021 Kennedy Boulevard, West New York, New Jersey. In a conversation in part French and part broken English Orsini displayed some knowledge of the part of New Jersey where they went. There was again the usual going in and out of buildings, walking up and down the

street and passing some time in a bar. Finally, Orsini returned to the Alrae. He left the Alrae at 10 P.M. with Ortega and they both walked to the corner of 63rd Street and Madison Avenue, where they got in a maroon 1970 Ford station wagon driven by Perez, and all three drove off together.

Between 10:00 P.M. and 12:20 A.M. on Sunday, September 19, Orsini, Ortega and Perez managed to escape the surveillance of the agents. But bits of evidence when put together make it pretty clear that the three were busy in New Jersey getting ready for delivery of the heroin. The agents had the license number and a description of the Ford station wagon. This was found abandoned in Hackensack, N.J. It was registered in the name of Rafael Rivera who gave his address as 608-82nd Street, North Bergen, N.J., which was not far from West New York and not a great distance from Hackensack. And it turned out that, when searched after his arrest, Perez had in his pocket the keys of the maroon Ford station wagon and a driver's license, a Social Security card, and a Selective Service Draft Certificate, all in the false name of Rafael Rivera. Perez gave the North Bergen residence as his address. It also turned out, as disclosed by the execution of a search warrant on this same September 19, also after the arrest, that 608-82nd Street, North Bergen, N.J. contained a vacant apartment, on the ground floor of a two-family house, with the name Rivera on or near the entrance door, and that hidden under the sink in a closed compartment, covered by newspapers, was a flexible balsam board and a Hanson 25 pound scale appropriate for the weighing and measuring of large quantities of heroin.

It also appeared that Ortega at the time of his arrest was carrying a driver's license in the name of Santos Hernandez who was supposed to live at the same address, 608-82nd Street, North Bergen, N.J. So two of these three appellants were tied in together at this vacant dwelling, which seemed to be a perfect choice for the conduct of such an illegal enterprise as the weighing and packaging of 93½ kilograms of heroin for delivery. And the third of these appellants, Orsini, had been seen crusing around the vicinity. It is significant that on September 16, 1971 the New Jersey Division of Motor Vehicles issued the registration of a Chevrolet to the supposed Santos Hernadez, or Ortega. This is the very day that Jaguar was parked at the New Madison Square Garden Garage. And it is in the same Chevrolet that we find Perez and Orsini escorting Ortega, who was driving the Jaguar, at the time of the arrest, as will appear shortly.

In any event, having made the necessary arrangements for delivery and payment, to their satisfaction, the trio now present themselves at the New Madison Square Garden Garage to pick up the Jaguar and its contents. It is now after midnight. The abandonment of the Ford station wagon in Hackensack is explained by the fact that Perez was now driving the Chevrolet. The trio had switched cars to put any possible followers off the scent. Ortega marched in with the parking ticket; the Jaguar is turned over to him by the garage attendant; but, to the dismay of the conspirators, the Jaguar will not start. The car is coasted down the ramp to the street floor; Perez comes in to help. Finally, the engine is started, with Ortega in the driver's seat. After going a block or

two, immediately followed by the Chevrolet, driven by Perez with Orsini beside him, the Jaguar, which the conspirators believe is filled with a million dollars worth of pure, uncut heroin, comes to a final stop at the intersection of 8th Avenue and 31st Street. What happens then is interesting. Each of the trio, Ortega, Perez and Orsini, makes a desperate effort to start the car. They are literally surrounded by government agents who appeared to be bystanders. When one of these, diagnosing the situation as carburetor trouble, takes off the air filter, Perez pushes him away, fearing that perhaps some of the precious heroin might be disclosed if people began taking the car apart. Perez finally got a cab driver to come and help while Orsini and Ortega in the Jaguar were trying to get the engine going. At this point the three appellants were arrested, and a search of their persons, incidental to the arrest, and a search of the premises at 608-82nd Street, North Bergen, N.J., and of Orsini's room at the Alrae pursuant to search warrants produced the incriminating documents above referred to and other items that we pass over as we think what has already been written shows that there was ample evidence to sustain the findings of guilt on both counts as against each appellant. There is much additional incriminating evidence. At least Ortega and Orsini were old hands at the business. False statements of one kind and another were made. But the essential facts are as above stated.

The testimonial and documentary proofs taken as a whole plainly justified, if they did not, indeed, compel a finding that Perez as well as Orsini and Ortega knew they were trafficking in heroin. The conspiracy and the know-

ing participation of each of these appellants were established beyond any doubt. There was ample proof that the three conspirators, Perez as well as Ortega and Orsini, were in joint possession and control of the Jaguar, which they thought contained the entire shipment of 180 bags of heroin, but which in fact only contained the ½ kilogram bag of heroin left in the car by the agents at the time they dismantled the Jaguar in the middle of the night at the garage opposite the Playboy Club. Moreover, the proofs were more than ample to establish aiding and abetting by Perez as charged in Count 2. So, we shall not discuss further the claim by each appellant that the evidence was insufficient to support the verdict and the judgments of conviction entered upon this verdict; and we turn to the other rulings that are alleged to call for a reversal of the judgments.

## *II*

### *There Was no Error in the Series of Rulings concerning the Identification, the Disclosure of the Whereabouts or the Production of the Government Informer*

From the beginning of the trial counsel for the defendants tried their best to manufacture some basis for reversal by their demands for the identification, disclosure of the whereabouts of and the production of the government informer who bought the Jaguar, brought it with its contents to New York, turned the Jaguar over to Gunther and then, without having seen or had any contact whatever with any of these appellants, disappeared from the scene of operations.

In their effort to show that the informer's testimony would be "relevant and helpful to the defense" or "essential to a fair determination" of the issues in the case, and thus bring the facts of this particular informer situation within the ruling of the Supreme Court in *Roviaro* v. *United States*, 353 U.S. 53 (1957), the arguments of counsel for these appellants were presented in a double aspect. In the first place, they claimed that the informer, if his identity and whereabouts were disclosed, might be called by them to testify in support of a conventional entrapment defense, or, if interviewed, that he might lead counsel to the discovery of leads that might be helpful in the establishment of such a defense by other proof. But this is not a case where a government undercover agent plays an active part in the carrying out of the transaction that is charged in the indictment against the defendant, as was the case in *Roviaro*. This is no buying or selling of a few $5 glassine bags of diluted heroin in which heroin peddlers and addicts play their parts. This is not a case in which the informer is the only person who could testify to a version of the single, simple narcotics transaction in such manner as to establish the innocence of the defendant. This is a large undertaking by a ring of international heroin exporters and it involves a million dollar shipment of pure, undiluted heroin. The notion that the government planned and created this venture to entrap the unknown individuals who might ultimately appear in the United States and receive the 93½ kilograms of heroin, weigh and package it for delivery and remit the proceeds to those in charge of the complex international venture is on the very face of the matter quite beyond the stretch of any probability. More-

over, it is clear beyond peradventure of doubt, as demonstrated by what each of these appellants did to effectuate the purposes of the conspiracy, as outlined in our statement of the evidence, that each of these appellants was ready, willing and able and had a prior propensity to engage in a heroin importation and distribution venture. So, we shall say no more of that phase of the entrapment claim.

The more serious phase of the so-called entrapment "defense" was the endeavor to bring this case within the ambit of those decisions that hold that where the government provides not only the occasion for committing the offense but also the contraband necessary for its consummation there is entrapment as a matter of law, irrespective of the propensity of the accused to commit the crime, because this is the only way to prevent such reprehensible and unworthy conduct on the part of the police. Thus in *United States* v. *Chisum*, 312 F.Supp. 1307 (C.D. Cal. 1970), the government informer received the counterfeit bills from the government, gave them to Chisum and then had him arrested for receiving counterfeit money with intent to pass the bills as genuine. In *People* v. *Strong*, 21 Ill.2d 320, 172 N.E.2d 765 (1961), the government supplied the very narcotics that gave rise to the alleged offense.

Without the slightest scintilla of proof, and without any offer of proof, and despite the fanciful nature of the hypothesis in the context of the facts disclosed in this record, counsel for the defendants made repeated statements that the million dollars worth of pure, uncut heroin had been purchased by the government, that the government had caused it to be placed in the Jaguar that had in turn been

purchased with government funds, all for purposes of entrapment. It was at first in vain that the prosecutor insisted there could be no issue in the case without some proof to back up these statements of counsel; that the record was bare of proof that the informant ever saw any heroin, that he ever put any heroin in the Jaguar, or any proof that this extensive international scheme of bringing heroin into the United States originated with either the informer or the government. Finally, as already indicated in our summary of the evidence, a stipulation was entered into between the prosecutor and counsel for all defendants that the government did not furnish any money to buy the Jaguar or give any instructions to the informer to buy it. One might have supposed that this would dispose of the matter. But no, counsel kept repeating their claims that the government had manufactured the crime and that they could prove it if only they could put their hands on the informer and get him into court as a witness. This led to almost interminable argument and discussion. Exercising meticulous care in seeing to it that appellants' rights should not be infringed, the judge listened and listened, and read and analyzed numerous cases cited to him. With this and the numerous suppression hearings during the trial, the members of the jury were sitting in the jury room twiddling their thumbs far more time than they spent in the courtroom listening to the evidence. While such interruptions of a trial are regrettable, the judge's patience had the salutary result of avoidance of error.

The informer issue was brought to a head by an intimation or suggestion by Mr. Fisher, counsel for Orsini, that perhaps progress could be made if, in the words of the

trial judge, "the government may choose to share with me *in camera* information which has bearing" on the role of the informer and the questions that had been raised by counsel for appellants. This met with general approval by counsel for all defendants, except that Mr. Fisher maintained that in the *in camera* proceeding, in the absence of counsel for appellants, the trial judge should be afforded an opportunity to question the informant. This led to a statement by the prosecutor that he could not produce the informant and that the Second Circuit decisions[2] made it perfectly plain that the government was not under any circumstances required to produce the informant. After everyone seemed to agree on this, the prosecutor said he objected to the *in camera* proceeding but would go ahead with it if the court so ruled, and the prosecutor requested a ruling, which was granted, to the effect that what occurred in the *in camera* proceeding should not be revealed to defense counsel. So, it was ordered that the transcript of the *in camera* proceeding by the court reporter be sealed and only unsealed upon proper showing to the court.

After all these preliminaries, and over the government's objection, the *in camera* proceeding took place, after it had been brought about at appellants' request. The prosecutor

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[2] The rule in this Circuit was articulated in *United States* v. *D'Angiolillo*, 340 F.2d 453, 455 (2d Cir.), cert. denied 380 U.S. 955 (1965), where this Court wrote: "where the informer's testimony may be relevant to the defense, the defendant is entitled to his name, to such information as the government may have concerning his whereabouts, and to reasonable cooperation in securing his appearance." The government is not required to actually produce the informer. See also, *United States* v. *Roberts*, 388 F.2d 646, 649 (2d Cir. 1968); *United States* v. *Russ*, 362 F.2d 843 (2d Cir. 1966); *United States* v. *Jones*, 360 F.2d 92 (2d Cir. 1966); *United States* v. *Coke*, 339 F.2d 183 (2d Cir. 1964).

with his files of documents went into the trial judge's chambers with the court reporter. After this was over, Judge Pierce returned to the courtroom and said:

> The Court: Gentlemen, Mr. Walker has made available to me, in camera, material which causes me to be familiar with the role of the informant in this case.
>
> On the basis of that familiarization, I can find no ground for supporting your requests for either revealing his identity or asking the government's cooperation in producing him here.
>
> I have had in mind, as I reviewed this material, the specific matters which you have called to my attention, your specific concerns, your specific assertions, and I nevertheless find none of these to be supported in any way by the material I have reviewed.
>
> In fact, I find that the situation is quite to the contrary.
>
> On the basis of this in camera proceeding, with the cooperation of the government having made this possible, I rule on your motions at this time and deny them with respect to the informant.

We cannot consider as an objection Mr. Fisher's remark, subsequent to this ruling, that informers are generally unreliable and that one cannot pay much attention to what they say. There were no motions and no further rulings.

The position taken by the prosecutor from the beginning was correct. The record is completely bare of anything to show that the informer could give testimony relevant to or essential to a fair determination of any of the issues in

the case. Thus the teaching of *Roviaro* has no application and all of the motions of defense counsel concerning the identification, the disclosure of the whereabouts or the production of the informer should have been denied without any *in camera* proceeding.

The references to the trial and in the briefs to *United States* v. *Jones*, 360 F.2d 92 (2d Cir. 1966) and *United States* v. *D'Angiolillo*, 340 F.2d 453 (2d Cir.), cert. denied 380 U.S. 955 (1965), show nothing contrary to what we have above stated. What is meant by "may" or "might" as the same thing as saying that if it does appear in the record that the testimony of the informer is shown by reasonable probability to be relevant or essential to a fair determination of any of the issues in the case, the government's privilege against disclosure is not available.

This we think disposes of the question of identifying, disclosing the whereabouts of and producing the informer.

## *III*

### *The Trial Judge Properly Refused to Suppress Any of the Objects Found on the Persons of Ortega, Orsini and Perez at the Time of the Arrest or at the Vacant Premises Stated by Perez to be his Home or in Orsini's Room at the Hotel Alrae or the Heroin left in the Jaguar*

When one is once familiar with the interrelation of the separate bits of evidence in this complicated case, as sketched in our summary, it is difficult to imagine how there could have been any lack of probable cause for the arrests or any insufficiency in the affidavits upon the basis

of which the search warrants were issued or of the proofs of probable cause adduced at the trial.[3] But the pattern of scraps and phrases culled from the mass of dicta and wide ranging observations found in the hundreds of court opinions in search and seizure cases gives an appearance of substance to what are mostly frivolous claims. They merit no more than brief discussion.

## *A*

### *The Jaguar and Its Contents*

The search by a Customs Agent and others helping him, in the hold of the Elizabeth II while still in midstream, was clearly proper as a border search. So was the cursory examination on the pier and the removal of a one-half kilogram bag of heroin from the car after the vessel was made fast. Under the circumstances of this case the search without a warrant in the midnight dismantling and reassembling of the Jaguar in the garage opposite the Playboy Club was a mere continuation of the border search. At this time the shipment of heroin was removed and placed in government custody, except for one-half kilogram bag that was left concealed under the driver's seat in such fashion that it could be disclosed and secured only by the use of tools. Surely the government was entitled to make it impossible for this large importation of dangerous drugs to slip through the fingers of its agents by some mischance. And it was equally proper to leave some of the heroin in the car for purposes of proof of the violations of the narcotics laws by those who might be expected to drive off

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[3] See *United States* v. *Canieso*, Slip Op. Docket No. 72-1789, 2d Cir., November 22, 1972, and cases cited.

the Jaguar in consummation of their illegal purposes, believing that still hidden in the inner recesses of the framework of the car was the entire 93½ kilograms of heroin.

Appellants make much of the fact that, for some period after the one bag of heroin was left concealed in the car, there was ample time to get a search warrant. They stress the fact that this search was conducted some two hours after Ortega, Orsini and Perez were arrested. There are several answers to this. We prefer to support the final search at the Headquarters of the Narcotics Squad, after the arrests of appellants, by the ruling of the Supreme Court in *Cooper* v. *California,* 386 U.S. 58 (1967) relative to the search of an automobile that is liable to forfeiture.[4] Here the Jaguar was clearly subject to forfeiture, pursuant to the provisions of 21 U.S.C., Section 881, applicable to the search of vehicles "which are used, or are intended for use, to transport or in any manner facilitate the transportation" of a narcotic drug.

It would seem that the search could also be sustained under the principle of *Chambers* v. *Maroney,* 399 U.S. 42 (1970), applicable to automobiles, when there is probable cause to search the car as distinguished from mere probable cause to arrest the defendants. *Chambers* seemingly supports the proposition that where the police may stop and search an automobile under the doctrine of *Carroll* v. *United States,* 267 U.S. 132 (1925), they may also seize it and conduct the search at a later time.[5]

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[4] The continued validity of *Cooper* was reaffirmed by the Supreme Court in *Collidge* v. *New Hampshire,* 403 U.S. 443, 482 (1971). See also *United States* v. *Francolino,* 367 F.2d 1013 (2d Cir. 1966), cert. denied 386 U.S. 960 (1967).

[5] See *Collidge* v. *New Hampshire,* 403 U. S. 443, 463 (1971).

*B*

*The Search of Orsini's Room 6J at the Hotel Alrae Pursuant to a Warrant*

The claim that the affidavit in support of the issuance of the search warrant of Orsini's room was insufficient is frivolous. So is the claim that it was error to refuse to conduct a hearing to ascertain whether the warrant was "tainted" by the alleged unlawful eavesdropping by one of the agents who occupied Room 6I, adjoining Orsini's Room 6J, who might have heard come conversations through the wall with his naked ear, or might have seen something by peeping through the keyhole of the door between the two rooms. It was discovered that an agent had been in this room when the prosecutor handed over to defense counsel the mass of what is called 3500 material.

Of all the speculations of counsel with which the briefs of the appellants are replete this one is the most farfetched and fanciful. How any information obtained in the adjoining room could be "related to the allegations establishing probable cause in the warrant" is far from clear to us. The almost compelling inference is that there was more than enough probable cause to be found: in Gunther's testimony that he gave the parking ticket to Orsini and arranged to receive the money from him at the Sports Bar the following Monday; the sketch of the places where the heroin was concealed in the framework of the car, the directions concerning how to get the heroin out of the car and the method to be followed in identifying and meeting Gunther, all of which documents were found in Orsini's possession at the time of his arrest; his riding around with Ortega and

Perez, and the final joint possession of the Jaguar and its one bag of heroin; all this convinces us that the so-called "taint" hearing was properly denied. It would have been error to rule that any such hearing should be had, under the circumstances of this case.

Besides, there had already been one suppression hearing on the subject of the search of Orsini's room before the trial commenced. The affidavit supporting the warrant, which made no reference to anything observed by the agent in the room next to Orsini's, had been found constitutionally sufficient; and no evidence of anything seen or heard by this agent was offered at the trial.

Moreover, what is supposed to be illegal about the conduct of this agent in the next room? It is conceded that no electronic surveillance was in any way involved. What can be heard by the naked ear is not protected by the Fourth Amendment, *United States* v. *Llanes*, 398 F.2d 880 (2d Cir. 1968), cert. denied 393 U.S. 1032 (1969). The Supreme Court had already noted that "The risk of being overheard by an eavesdropper * * * is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa* v. *United States*, 385 U.S. 293, 303 (1966), quoting with approval from Justice Brennan's dissent in *Lopez* v. *United States*, 373 U.S. 427, 465 (1963). We would suppose that the same rule applied to what can be seen by the naked eye, even through a keyhole.

*C*

*The Search at 608-82nd Street, North Bergen, N.J.*

We find the affidavit supporting the warrant to search these premises, and the evidence adduced at the trial, made a more than sufficient showing of probable cause. The mere fact that no money or narcotics were found is of no moment. The claim of insufficiency is just as frivolous as the one made in connection with the search of Orsini's Room 6J at the Hotel Alrae.

*IV*

*The False Statements by Orsini in his brief Interrogation before His Arraignment Were Properly Received*

The arrests took place at about 2:20 A.M. of Sunday, September 19. There was a brief questioning at Narcotics Headquarters after the *Miranda* warnings had been given. Neither then nor at any time was Orsini subjected to any prolonged interrogation, nor was he asked any other than the most perfunctory questions. But, as these events occurred early in the morning of a Sunday, when no Commissioner was available, and the following Monday was a Jewish Holiday and the office of the United States Attorney was understaffed, Orsini was not brought down to the Courthouse until about 1:30 P.M. although a Commissioner was in attendance from 10:00 A.M. on. There was a brief interrogation by an Assistant United States Attorney prior to arraignment. What this amounted to, with the assistance of a French interpreter, was the submission to Orsini of a series of written questions. He was told to

answer the ones he wished to answer and not to answer the others. This was after the *Miranda* warnings had been repeated to him. The answers he gave were false in that he gave a false name, denied he had been in an automobile with other people on the preceding Saturday night, and he denied he had ever been in the Abbey Victoria Hotel. The trial judge overruled the objection to these admissions on the ground that they were clearly voluntary and that the *Miranda* warnings had been properly given.

We are now asked to hold that the answers should have been excluded and the judgment of conviction against Orsini reversed, not because the statements were not voluntarily made but solely because the lapse of time between the early morning of Sunday when the arrest was made and the arraignment before the Commissioner in the mid afternoon of Monday was more than 6 hours in excess of the time required for transportation. We agree with the holding of this Court in the similar case of *United States* v. *Marrero*, 450 F.2d 373 (2d Cir. 1971) to the effect that no violation of the principles of *McNabb* v. *United States*, 318 U.S. 332 (1943) and *Mallory* v. *United States*, 354 U.S. 449 (1957) is shown, nor any failure to comply with the requirements of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., Section 3501. We also refuse to accept the invitation by Orsini's counsel to reexamine the holding of this Court in *Marrero* or to hold 18 U.S.C., Section 3501 unconstitutional.

The writer of this opinion also wishes to state that he disagrees with the suggestion or intimation or whatever it may be called, in Chief Judge Friendly's concurring opinion in *Marrero* at page 379 that there is something

improper, after overnight custody, in the traditional custom of a "detour" for brief questioning in the office of the United States Attorney, as a person who has been arrested is being taken before a magistrate for arraignment.

## V

### *The Bizarre Motion for a Severance and for a Mistrial on Behalf of Ortega*

After both sides had rested and the summations were about to begin, a new lawyer appeared on Ortega's behalf and made a motion "for a mistrial as to Mr. Ortega and for a severance of his case from the trial of Mr. Orsini." This turn of events is supposed to have been caused by a desire on the part of Orsini "to exculpate" Ortega, "but he is not prepared to do it before the jury that will decide the question of his (Orsini's) guilt or innocence." No credible explanation of how Orsini is to do this exculpating is proffered. The trial judge denied the motion, but with leave to renew it on written papers after the jury had rendered its verdict. So, the motion was renewed later on written papers and we are asked to give serious consideration to Orsini's generous proposal that if his case is or had been severed, he would have taken the witness stand and his exoneration of Ortega would be so convincing and persuasive that Ortega would be acquitted. Just what explanations Orsini was prepared to give for all the things he and Ortega had done together in furtherance of the conspiracy is left to conjecture. This is reminiscent of the statement by Orsini's counsel during the trial that if the government informer was produced Orsini might recognize him as the man who solicited him to come from

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abroad but had concealed from him the fact that heroin was involved, and that Orsini would testify to this as a witness in his own defense. Of Course, Orsini did not testify to this or anything else.

We are solemnly told that Ortega was going to call upon Orsini as his witness in defense but failed to do so as he anticipated that Orsini would assert his Fifth Amendment privilege. We are also solemnly told that "Orsini forthrightly stated that Luis Ortega and George Perez had absolutely no knowledge that the Jaguar contained heroin."

We hold that there is no merit in this extraordinary and tardy maneuver. The trial judge properly denied the motion, and this ruling furnishes no basis for a reversal of any of the judgments appealed from.

## *VI*

### *There Was No Impropriety on the Part of the Prosecutor in Making Reference During His Summation to the Dates in the Passport Carried by Orsini*

There was testimony by Gunther that Orsini had told him he had visited the United States on other occasions on similar illicit business. This is to some extent corroborated by other testimony. The brief and incidental reference in the prosecutor's summation to the dates in the passport was of no consequence. The passport had been received in evidence without objection and without limitation. The jury could if they chose examine any and all of the entries in the passport. However, in the light of the

evidence taken as a whole, it is highly improbable that the jury took any interest in the passport or in Orsini's other trips to the United States, except perhaps to take note of the fact that Orsini was using a passport issued to someone else, that he was masquerading under this other person's name, and that he or some other person at his request had done an especially clever piece of forgery by substituting Orsini's photograph for the photograph of the real Jean Pierre Andre Huguen.

The prosecutor denied that he had orally agreed to make reference in his summation to the entries in the passport. As held by the trial judge, it would have been a simple matter for counsel to insert this limitation in the written stipulation. The passport was received in evidence for all purposes; and the trial judge properly held that it must be presumed "that the stipulation embodies the full and complete agreement of counsel." It would have been error to grant counsel's request to instruct the jury that the passport was no proof of prior trips by Orsini to this country.

We cannot conclude this opinion without a word of comment on the wholly admirable way in which the prosecution of this complicated and difficult case was conducted by Assistant United States Attorney John M. Walker, Jr.

Affirmed.

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February 9, 1973. On February 8, 1973 (No. 72-1098) and February 9, 1973 (No. 72-1103) the petitions were filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court properly held that the government was not required to divulge the identity and whereabouts of an informant.

2. Whether search of a car, hotel room and apartment violated petitioners' Fourth Amendment rights.

3. Whether the prosecutor failed to keep an alleged agreement with defense counsel.

4. Whether the district court properly admitted a false exculpatory statement made by petitioner Orsini after his arrest.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners and one Perez were convicted as charged on two counts of having conspired to import, distribute, and to possess heroin with intent to distribute it and having distributed and possessed with intent to distribute heroin in violation of 21 U.S.C. 846 and 841 (b)(1)(A). Petitioner Ortega was sentenced to ten years' imprisonment on Count One and fifteen years' imprisonment on Count Two, the sentences to run consecutively, and was fined $35,000. Petitioner Orsini was sentenced to fifteen years' imprisonment on Count One and ten years' imprisonment on Count Two, the

sentences to run consecutively, and was fined $35,000. The court of appeals affirmed (Pet. App. A).[1]

The facts in this case have been detailed in the comprehensive opinion below (Pet. App. A2–13). Briefly, evidence at trial revealed that the relevant events commenced with a series of meetings in France in August and September 1971, wherein one Etienne Mosca, a Frenchman, persuaded co-defendant Gunther,[2] also a Frenchman, to go to New York and bring back a large quantity of currency which he was to smuggle into France and deliver to Mosca (Tr. 54, 58–63, 65–72, 74–77). Mosca gave Gunther elaborate instructions about meeting two men in New York, the first of whom, a blond, thirty-five year old man, would give Gunther a claim ticket for a parked car on September 16, 1971 (Tr. 66–67). Unknown to both Mosca and Gunther, this contact man, whom Gunther had never seen before, was also serving as an informant for the Bureau of Narcotics and Dangerous Drugs (Tr. 158, 166–167). After receiving the claim ticket from the blond man, Gunther was to meet the second man, subsequently identified as petitioner Orsini, on two occasions. At the first meeting on September 17, 1971, Gunther was instructed to hand Orsini the claim ticket and arrange a subequent meeting, no later than September 19, at which Orsini would

[1] "Pet. App. A" refers to the appendix of Orsini's petition.

[2] Gunther pleaded guilty to one of the counts in the indictment and testified as a government witness at petitioners' trial.

French as to how to remove the heroin from the car and how to recognize Gunther (Govt. Exhibits 25-27, Tr. 799–802, 807–812).

Later in the day search warrants were executed for Orsini's hotel room and Perez' apartment. At the apartment, agents found and seized a 25 pound scale (Tr. 344–347, 390–392). At 1:50 p.m. the following day, Monday, September 20, 1971, Orsini was interviewed by an Assistant United States Attorney prior to his arraignment at 4:00 p.m. Orsini claimed his name was Huguen and denied riding in a car the evening of his arrest (Tr. 828–829, 835–837, 842–846).

## ARGUMENT

1. Petitioners contend that the government's refusal to disclose Festus' true identity and whereabouts deprived them of information which might have helped them establish an entrapment defense. Petitioner Orsini contends that, although he had been a willing participant in a venture which he knew to be illegal (Pet. 25), the disclosure of the informant could have helped him establish the traditional entrapment defense because "his trip to the United States was triggered by a meeting with a man who fit the general description available of the informer" (Pet. 10).[6] This claim, which was made by Orsini's counsel and never verified under oath by petitioner who put in no defense or affidavit in support of his claim, does not even approach the showing necessary to establish

[6] Orsini's counsel admitted at trial that the man with whom petitioner met did not quite fit the description of the informant, since he did not have the same hair color (Tr. 210–211).

an entrapment defense either under the traditional standards, set out in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, or under the "new entrapment defense" suggested by some recent lower court decisions, and relied upon by both petitioners (Orsini Pet. 9–18; Ortega Pet. 7–14). The court of appeals properly rejected these claims.

### A. THE TRADITIONAL DEFENSE

Under the traditional entrapment defense, it is not enough that an informer or undercover agent aided the defendant in the commission of the crime; rather it must be shown that he 'implant[ed] in the mind of an innocent person the disposition to commit the alleged offense." *Sorrells* v. *United States,* 287 U.S. 435, 442; *Sherman* v. *United States,* 356 U.S. 369. Petitioner Orsini offered to show only that he met "with someone [possibly the informant] prior to coming to this country and it was from that someone that he received [the] instructions" (Tr. 288) which he followed when he arrived in the United States. But even if the informant was that "someone," there is no basis in the offer of proof for the claim that Orsini, who admits that he knowingly entered upon illicit activity (Pet. 25), was an "innocent person" in whose mind had been planted the disposition to commit the offense.[7] Moreover, as the court of appeals observed, "it

[7] Petitioner Ortega claimed that the informant would testify that he (Ortega) and a co-defendant Perez, "were unknown to the importer-informant" (Ortega Pet. 9). Clearly in these circumstances there is not the slightest basis for the traditional or the "new" entrapment defense. See *e.g.*, *United States* v. *Sanchez*, 440

is clear beyond peradventure of doubt, as demonstrated by what each of these appellants did to effectuate the purposes of the conspiracy, as outlined in our statement of the evidence, that each of these appellants was ready, willing and able and had a prior propensity to engage in a heroin importation and distribution venture" (Orsini Pet. App. A15).

B. THE "NEW ENTRAPMENT DEFENSE"

Petitioners, relying principally upon *United States* v. *Russell*, 459 F. 2d 671 (C.A. 9), certiorari granted, 409 U.S. 911, argued February 27, 1973, also claim that the presence of the informant would have helped them establish a defense based solely on the activity of the informant—regardless of their obvious criminal propensity. But as the court of appeals here found, *Russell* and similar cases, whether correctly decided or not, only stand for the limited proposition that where the government "provides not only the occasion for committing the offense but also the contraband necessary for its consummation [there may] be entrapment as a matter of law, irrespective of the propensity of the accused to commit the crime" (Orsini Pet. App. 15).

Here the informant did no more than act as a "conduit" in transferring the heroin from its illicit source to petitioner. Such conduct by government

F. 2d 649 (C.A. 9); *United States* v. *Jenkins*, 470 F. 2d 1061, 1063 (C.A. 9), certiorari denied, April 2, 1973 (No. 72-995). Moreover, since it was never alleged that the informant knew Ortega or Perez it is difficult to determine how the presence of the informant would have aided their defense.

agents has repeatedly been recognized as a proper investigatory tactic. See *e.g., Chapman* v. *United States,* 443 F. 2d 917 (C.A. 10); *United States* v. *Beckley,* 335 F. 2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States,* 380 U.S. 922; *United States* v. *Davis,* 272 F. 2d 149 (C.A. 7); *United States* v. *Sohnen,* 298 F. Supp. 51 (E.D.N.Y.).

Since it was stipulated that the informant purchased the Jaguar, although not with government funds, and that the informant transported the heroin ladened vehicle into the United States with the knowledge and acquiesence of the government (Tr. 927), and since the district court determined that the heroin was not supplied by the government,[8] it is plain that the availability of the informant could not have added anything further that could have possibly aided petitioners' "defense." The district court thus properly refused, after an *in camera* hearing, to endanger his

[8] The district court conducted an *in camera* proceeding with the consent of petitioners to determine whether the conduct of the informant came within the ambit of the "new entrapment" cases. After examining materials provided by the United States Attorney, the district court stated (Tr. 415–416):

"THE COURT. I have explored this matter explicitly from materials in the possession of the government and have satisfied myself that the Bueno situation [*United States* v. *Bueno,* 447 F. 2d 903 (C.A. 5)] is not the situation which we face here.

Just so you might be perfectly clear, I mean that I have inquired into the question of the informant's involvement in terms of any dealing with the heroin or any loading of the heroin into the vehicle and all of those various points which you have raised."

Following these findings, there were no further motions to disclose the informant's identity (Pet. App. A18).

life by requiring the divulgence of his whereabouts or insisting on his presence at trial.[9]

We direct the attention of the Court, however, to the recent *per curiam* opinion of the Court of Appeals for the Ninth Circuit in *United States* v. *Knight*, C.A. 9, No. 72–2031, decided October 16, 1972, pending on the government's petition for certiorari (No. 72–965), which seems to go beyond *Russell*, and suggests that in the Ninth Circuit's view some activity falling short of actually supplying contraband may suffice to give rise to the "new entrapment defense." There, as here, an informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. The Ninth Circuit summarily affirmed the suppression of evidence, citing *Russell* and several similar cases, but without discussion. The petition for certiorari filed by the United States cited an apparent conflict between the holding in *Knight* and the holding in the instant case as a basis for granting the petition for review (Pet. 10–13).

We adhere to the view that this case was correctly decided by the court of appeals, and that the decision below is in accord with the well-settled law. Indeed, in *United States* v. *Jenkins*, 470 F. 2d 1061 (C.A. 9), certiorari denied, April 2, 1973 (No. 72–995), the Ninth Circuit without citing its earlier decision in *Knight* held that the "new entrapment defense" which it had

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[9] This case illustrates the danger of revealing the identity and whereabouts of informants, since the Jencks Act statements of the principal witness, Gunther (proferred to the defense in accord with 18 U.S.C. 3500) reveals that petitioners threatened Gunther or his family with death if he cooperated with the government (Tr. 243–252).

created in *Russell* was inapplicable unless it is shown that the defendants were "induced" by the informant to commit the offense (470 F. 2d at 1063). There is no claim here that either petitioner was anything but a willing participant in an international heroin smuggling ring.[10] The Court may, however, wish to defer action on the petitions here, pending the disposition of the petition in *Knight*.

2. Petitioners also contend that the search of the Jaguar, of Orsini's hotel room, and of Perez' apartment violated their Fourth Amendment rights, that the prosecutor failed to keep an alleged agreement made with defense counsel, and that Orsini's exculpatory statement two hours before arraignment was obtained in violation of *McNabb-Mallory*. These contentions were thoroughly considered and properly rejected by the court below (Pet. App. A19–A27), upon whose opinion we rely.[11]

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[10] Moreover, we note that petitioners' activities were sufficient to justify their conviction on the conspiracy count (Count I), even under the new entrapment defense upon which they rely, regardless of the effect that the subsequent activities of the informant might have on the substantive count here (Count II). See *United States* v. *McGrath*, 468 F. 2d 1027, 1031 (C.A. 7), petition for certiorari pending (No. 72–761); *United States* v. *Chisum*, 312 F. Supp. 1307, 1312 (C.D. Calif.); cf. *United States* v. *Basey*, 468 F. 2d 194, 195–196 (C.A. 9), petition for certiorari pending (No. 72–786). But since petitioners received consecutive sentences on both counts, this is not a case where the concurrent sentence doctrine would be appropriate.

[11] We would only add that petitioner Orsini's reliance on *United States* v. *Case*, 435 F. 2d 766 (C.A. 7), in support of his claim that "a person is entitled to reasonable expectations of privacy within his hotel room * * * [from] *non-electronic* eaves-

## CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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dropping, from corridors or adjoining rooms" (Pet. 27, emphasis added), fails to note that the Seventh Circuit has limited *Case* to its facts, and held that it applied only where the law enforcement officers listened to conversation while stationed "in a place where they had no right to be" (*United States* v. *Hanahan*, 422 F. 2d 649, 653 (C.A. 7)). Here, of course, the law enforcement officers had a legal right to be in the adjoining hotel room which they rented.

U.S. GOVERNMENT PRINTING OFFICE: 1973